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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

77-1511

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

V.

EVELYN ELLIOTT, ET AL.

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V.

FANNIE BUFFINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' MOTION TO DISMISS OR REMAND

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Pursuant to Rule 35, respondents move this Court to dismiss the writ of certiorari granted in this case or alternatively to remand[1/] this case to the respective district courts for a determination of the effect, if any, on their previous judgments of: (1) the new Claims Manual recoupment procedures issued by the Secretary to be effective January, 1979 which are revealed for the first time in his Opening Brief; and (2) the new facts and statistics, not part of the record of this case, but included in the Secretary's Opening Brief and which are heavily relied on by the Secretary in all his legal arguments.[2/] Since the Secretary argues that these new Claims Manual procedures and facts significantly alter the balancing of the respective interests in this case, it is obvious that he is abandoning review by this Court of the current procedures which were scrutinized by all the lower courts. For these reasons, dismissal of the writ, or alternatively, remand of this case is warranted.

1/ Remand of this case must not include a vacation of the lower courts' current injunctions because to do so without first providing respondents with a meaningful opportunity to demonstrate that the Secretary's new procedures and facts do not affect the judgments in this case would work a grave injustice. Rather this Court should remand with instructions to the lower court to review, under the authority of Rule 60 of the Federal Rules of Civil Procedures, these newly disclosed procedures and facts.

I.

STATEMENT OF THE CASE

In granting the Secretary's petition for a writ of certiorari, this Court agreed to review the judgment of the court of appeals in favor of respondents on the following issues of whether: (1) the district courts properly

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2/ So as to avoid confusion all references to the Opening Brief in this motion are to the printed brief served on respondents on December 21, 1978. This brief is to be distinguished from the incomplete, typewritten brief which was filed in this Court on December 4, 1978 and served on respondents on December 11, 1978. The typewritten brief was filed some 25 days after the deadline set by this Court without the Secretary obtaining the requisite permission of this Court to file a late brief.

exercised jurisdiction over these cases under either 28 U.S.C. § 1361 or § 205(g) of the Social Security Act to grant injunctive and class relief as sought by respondents; and (2) the Secretary's procedures to recover overpayments from social security recipients were constitutionally defective insofar as they failed to provide the recipients with a pre-recoupment opportunity for an oral hearing on their statutory right to waiver under § 204(b) of the Social Security Act.[3/]

To summarize, the Secretary's recoupment procedures found to be illegal by all the courts below are as follows:

(1) the Secretary makes an ex parte overpayment decision and so informs the recipient; however he makes no initial decision regarding waiver of that overpayment;

(2) the recipient has 30 days in which to request for reconsideration of that decision. This reconsideration could include both a redetermination of whether there is an overpayment and if there is, a decision of whether recovery should be waived;

(3) during this short 30 day tolling period, the recipient may submit in writing information which

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3/ Section 204(b) provides that:

> In any case in which more than the correct amount of payments has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience. (Emphasis added.)

either contests the overpayment determination or supports a request for waiver of recoupment of the overpayment. This information is gathered by a district office of the Social Security Administration and is then forwarded to one of the seven (7) regional program centers where the ex parte waiver decision is made;

(4) reduction or suspension of the recipient's social security benefits should be tolled during this initial 30 day reconsideration/waiver period;[4/] and

(5) solely on this paper review, the Secretary initially decides the waiver question.

All the respondents in this case are recipients of either old age, disability, or survivor's benefits under Title II of the Social Security Act. All of them received the forms notices from the Secretary announcing his ex parte determination of an overpayment. All of them timely contacted the local Social Security office, i.e., within 30 days from receipt of the notice of overpayment, for the purposes of contesting both these overpayment decisions and, more importantly, to assert their statutory rights to waiver. In all cases, Respondents' efforts to contest the overpayment and seek waiver were not sufficient to halt the recoupment action proposed by the Secretary. See e.g., Elliott v. Weinberger, 371 F. Supp. 960, 966, note 14 (D. Haw. 1974).

4/ Unfortunately, while all of the lower courts found as a matter of fact that the respondents had timely sought waiver of the overpayment, recoupment was begun by withholding at least one month's benefits in each of their cases. See e.g., Elliott v. Weinberger, 371 F. Supp 960, 966, note 14, (D. Haw, 1974).

At the heart of the controversy before the lower courts was the validity of the Secretary's limited, "written submission" procedure employed to determine the highly individualized and subjective questions involved in deciding whether a recipient was "at fault" in causing or retaining an overpayment or whether recovery would cause a "hardship," i.e. be contrary to the remedial purpose of Title II of the Social Security Act. Each of the respondents was notified by the Secretary that he intended to suspend or substantially reduce their monthly social security checks because he believed that there had been an overpayment. Each of the respondents timely filed waiver requests with the Secretary, but the Secretary provided only a truncated, written submission procedure by which he would determine, pursuant to his regulations promulgated under § 204(b) (See 20 C.F.R. 404.507, 508, and 509)[5/] the credibility and detrimental reliance of each respondent in order to reach a decision on their waiver requests.

5/ These critical sections of the Secretary's regulations on "fault" and "hardship" provide as follows:

> § 404.506 When waiver of adjustment or recovery may be applied.
>
> Sections 204(b) and 1870(c) of the Act provide that there shall be no adjustment or recovery in any case where an incorrect payment under Title II (old-age, dependent's, survivor's and disability insurance benefits) or under Title XVIII (hospital and supplementary medical insurance benefits) has been made (including a payment under Section 18184(e) of the Act) with respect to an individual:
>
> (a) Who is without fault, and
>
> (b) Adjustment or recovery would either:
>
> (Cont'd on next page

In two separate actions [Elliott v. Weinberger, Civil No. 72-3629 (D. Haw. 1972) and Buffington v. Weinberger, Civil No. 734-73C2 (W.D. Wash., 1974)], respondents challenged the Secretary's recoupment procedures on the grounds that they violated § 204(b) and the due process clause of the fifth amendment. Both district courts ruled in favor of respondents. Those decisions were appealed, and after consolidating the cases, the Ninth Circuit Court of Appeals issued a decision essentially affirming those rulings. The Secretary sought a writ of certiorari from this Court. Subsequently, this Court granted the writ and remanded the case for a redetermination in light of its decision in Eldridge v. Matthews, 424 U.S. 319 (1976). On remand, the court of appeals again judged the Secretary's recoupment procedures as constitutionally defective. 564 F.2d. 1219 (9th Cir. 1977). The Secretary's second petition for writ of certiorari was granted by this Court on October 2, 1977.

5/ (Cont'd)

> (1) Defeat the purpose of Title II of the Act, or
>
> (2) Be against equity and good conscience.
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> [32 F.R. 18026, Dec. 16, 1967]
>
> § 404.507 Fault.
>
> 'Fault' as used in 'without fault' (See §§ 404.506 and 405.355) applies only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In
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> (Cont'd on next page)

II.

THE NEW FACTS AND CLAIMS MANUALS PROVISIONS DISCLOSED BY THE SECRETARY IN HIS OPENING BRIEF REQUIRE DISMISSAL OR ALTERNATIVELY REMAND OF THIS CASE

During the past 6 years of litigation in this case, on four occasions, three different federal courts have examined and analyzed the constitutionality of the

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5/ (Cont'd)
determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition. What constitutes fault (except for 'deduction overpayments'--See § 404.510) on the part of the overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under Section 1814(e) of the Act, resulted from:
(a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or
(b) Failure to furnish information which he knew or should have known to be material; or
(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.
[34 F.R. 14888, Sept. 27, 1969; 34 F.R. 15646, Oct. 9, 1969]

§ 404.508 Defeat the purpose of Title II.

(a) General. 'Defeat the purpose of Title II,' for purposes of this subpart, means defeat the purpose of benefits under this Title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs.
(Cont'd on next page)

Secretary's recoupment procedures as they were set forth in the Claims Manual, § 5500, et. seq. (his administrative handbook distributed to all of his employees and which all employees are required to follow) and on each occasion, these procedures were found unfair, unreliable and illegal. Subsequent to this Court's granting his petition

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5/ (Cont'd)
An individual's ordinary and necessary expenses include:
(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under Title XVIII), taxes, installment payments, etc.;
(2) Medical, hospitalization, and other similar expenses;
(3) Expenses for the support of others for whom the individual is legally responsible; and
(4) Other miscellaneous expenses which may reasonable be considered as part of the individual's standard of living.
(b) When adjustment or recovery will defeat the purpose of Title II. Adjustment or recovery will defeat the purposes of Title II in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses.
[32 F.R. 18026, Dec. 16, 1967, as amended at 34 F.R. 14888, Sept. 27, 1969]

'Against equity and good conscience' means that adjustment or recovery of an incorrect payment (under Title II or Title XVIII) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1) and (4)) or changed his position for the worse (examples (2) and (3)). In reaching such a determination, the individual's financial circumstances are irrelevant.

for a writ of certiorari, the Secretary in his Opening Brief, for the first time, reveals new Claims Manual procedures governing his recoupment system which have never been examined by any of the lower courts and which, according to the Secretary, may significantly affect the disposition of this case. He describes this new system as follows:

> Under the new Claims Manual provisions that will become effective in January 1979 (App., infra.), recoupment generally will not require more than a 25 percent reduction in monthly benefits unless the overpayment was obtained by fraud or the beneficiary still has the overpaid amount in his possession. In the absence of fraud or retention of the overpayment, the Social Security Administration will no longer propose temporary interruption of monthly benefits. Op. Br. at 31. (Emphasis added.)

Consequently, at pages 31-33 of his brief, the Secretary vigorously contends that these regulations substantially alter the private interest which the recipient has at stake in obtaining a pre-recoupment oral hearing under this Court's decision in Matthews v. Eldridge, 424 U.S. 319 (1976). Unquestionably, since the Secretary premises his entire legal argument on these new procedures and he does not address the recoupment procedures invalidated by the court of appeals, there has been a drastic change in position by the Secretary.6/

6/ Undoubtedly there is still a substantial justiciable controversy between the parties because, for example, there are several important matters still unresolved by the Secretary's new procedures. In these new Claims Manual procedures the Secretary certainly has not provided for the opportunity for an oral evidentiary hearing as required by the court of appeal's decision. In lieu of following that decision, the Secretary has merely set a limit on the amount to be recouped during
(Cont'd on next page)

Whereas before the court of appeals the Secretary argued, inter alia, that his current recoupment procedures were valid even though it was his practice to suspend indefinitely respondents' entire monthly check, now, because of these new procedures, he contends there is no deprivation, only a temporary, limited reduction of the recipient's property interest.7/ By this maneuver, the Secretary is attempting to have this Court validate a system which he concedes may be substantially different from the one before the lower courts. This he cannot do for it is the settled law of this Court that it will not be misled into issuing advisory opinions. EPA v. Brown, 431 U.S. 99, 103-104 (1977); Fusari v. Steinberg, 419 U.S. 388 (1975); Richardson v. Wright, 405 U.S. 208 (1972).8/

6/ (Cont'd)
any one month period. Additionally, by issuing these new procedures which do set such a limit, the Secretary has clearly acknowledged the importance of the recipient's interest in receipt of that monthly amount.

7/ It is noteworthy that the Claims Manual sections unveiled by the Secretary in his Opening Brief are changes to the same Claims Manual sections which are attached to the Petition for a Writ of Certiorari. Compare Pet. App. pp. 141a-142a with pp. 4a-13a of the Opening Brief.

8/ In EPA v. Brown, this Court stated that:

> We decline the Government's invitation to pass upon the EPA regulations when the only ones before us are admitted to be in need for certain modifications. Such action on our part would amount to rendering of an advisory opinion. For this Court to review regulations normally required to be reviewed by the Court of Appeals, before such review is had, is extraordinary. (Citations omitted.) 431 U.S. 99, 103-104.

In addition to unveiling these new procedures, the Secretary in his brief conveniently discloses numerous facts and statistics which were also never presented to any of the lower courts and are therefore not properly part of the record of this case. See, e.g., pp. 45, 46, 47, 49, and 50 of the Op. Br. In his brief, the Secretary discusses these facts and figures at great length in an effort to show that under Eldridge v. Matthews, supra, there is no need to provide pre-recoupment oral hearings and that such hearings involve a significant governmental burden. In fact these new matters are central to the Secretary's current claims that the court of appeals decision is wrong and inconsistent with this Court's ruling in Eldridge v. Matthews, supra. This tactic is highly prejudicial to respondents and places them in an intolerable position in that respondents have never had any opportunity to investigate the authenticity or veracity of these facts and statistics so heavily relied on by the Secretary. Moreover, respondents will never have such an opportunity unless this Court acts now because the Secretary in his brief conveniently fails to either provide the actual documents containing these new facts or citations to the sources of these new facts and statistics. Either these facts and statistics are important to the disposition of this case and respondents should be permitted a fair opportunity to probe their authenticity and veractiy or they are irrelevant and should be stricken by this Court.

In any event, the Secretary has wrongly attempted to supplement the record of this case in this Court with

numerous new and untested, unsubstantiated facts and statistics.[9/]

III.

CONCLUSION

In view of the foregoing, the writ of certiorari should be dismissed or, at a minimum, this case should be remanded to the respective district courts for the initial determination of the effect, if any, of this new procedure and factual matter on their previous judgments. Of course, in remanding this case, in light of the Secretary's conduct herein the injunctions issued by the lower courts should remain in full force and effect until, and unless, they are vacated by those lower courts.

DATED: Honolulu, Hawaii, January 4, 1979.

STANLEY E. LEVIN
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Attorneys for Respondents

9/ The compelling need for the respondents to probe these new factual representations is illustrated by the fact that in his efforts to obtain a stay of the Buffington district injunction, the Secretary represented to this Court that this injunction would cost the government between 15 and 40 million dollars. In his brief, the Secretary now claims that there are $100,000 in what he terms "direct" costs and at least $850,000 in "indirect" costs. Op. Br. at 49-50. The variance of these claims is astounding and it highlights the necessity for the Secretary to be required like any other litigant to prove his claims by a preponderance of the evidence before a court rather than being allowed on appeal to disclose "facts" in the face of a certified record. Such an effort must be condemned. See Adickes v. Kress & Co., 398 U.S. 144, 157-158, n. 16. (1970); Hopt. v. Utah, 144 U.S. 488, 491-492 (1885); Russell v. Southard, 53 U.S. (12 How.) 139, 158-159 (1851).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be duly MAILED, postage prepaid, two (2) copies of the foregoing document to:

PETER BUSCEMI
Deputy Solicitor General's Office
Department of Justice
Washington, D.C. 20530

and one copy each to:

WADE H. McCREE, JR.
Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

ROBERT GREENSPAN
Civil Appellate Division
Justice Department
Washington, D.C. 20530

this 4th day of January, 1979.

DATED: Honolulu, Hawaii, January 4, 1979.

STANLEY E. LEVIN